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## Judicial and Practitioner Perspectives on ADR

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# JUDICIAL AND PRACTITIONER PERSPECTIVES ON ADR<sup>1</sup>

Moderator: Professor Derek T. Muller

Speakers: Honorable Barry Russell, Honorable  
Victoria Kaufman,  
Mark Travis & Selina Shultz

**Derek Muller:** Thank you all for being here. I guess you don't want to go escape in the rain this Friday afternoon, so join us here for a panel. For those of you that don't know me, my name is Derek Muller and I am an associate professor here at Pepperdine. I teach mostly in litigation related courses and I really look forward to moderating this panel of distinguished judges and practitioners on judicial and litigator perspectives on alternative dispute resolution quite broadly. So I think this Panel will touch on a wide variety of subjects.

First, we are going to hear from Judge Barry Russell. He was appointed in 1974 to the bankruptcy court where he has served ever since after a stint in the Department of Treasury and the Department of Justice. He graduated from UCLA with both his Bachelors and his JD. He is going to open our program discussing some of the background of the structure of the program of the alternative dispute resolution ("ADR") program in the bankruptcy courts.

After that, we will hear from Judge Victoria Kaufman. She is a graduate of Bryn Mawr College and Harvard Law School. And after an extensive private practice career, she was appointed to the bankruptcy court in 2006 and Judge Kaufman will be speaking about her own experience with alternative dispute resolution and bankruptcy.

After that we are going to hear from Selena Schultz. She has been a mediator for twenty years. She received her LLM in dispute resolution from the Straus Institute. She mediates a wide variety of employment, complex and simple divorce and custody cases, and all kinds of civil and business cases. She has been an adjunct here at Straus and she will be speaking a little bit about bankruptcy, but mostly about challenges in the EEOC and private alternative dispute resolution mechanisms.

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<sup>1</sup> This is a transcript of the second of two panels from the "Synergy: Flexibility as Key to ADR Practice" Symposium, hosted by Pepperdine's Dispute Resolution Law Journal, which was held February 10, 2017 at Pepperdine Law School in Malibu, CA. This panel was moderated by Derek T. Muller, Professor of Law, Pepperdine School of Law, with participation from Honorable Barry Russell, Honorable Victoria Kaufman, Mark Travis, and Selina Shultz.

And finally we are going to hear from Mark Travis. He has his law degree from the University of Louisville. He also has a Masters from the Straus Institute. He has been an arbitrator, or he has been a neutral—is that the word I am supposed to use, a neutral?—for nearly ten years after twenty-five years of more active practice. He is going to speak more on employment perspectives, especially with the EEOC, the privately mediated case and court ordered level of mediation.

So each of our panels will speak for about ten minutes on their own topics. We will have an opportunity for some dialogue among the panelists and then we will open it up for questions before closing promptly at 4:50 PM. With that, Judge Russell.

**Judge Russell:** Okay, well thank you. It is always a pleasure to be here. I come out here at least a couple of times a year. And, I'm going to give you a little bit of an idea about who we are and where we are in the structure of the bankruptcy court.

First of all, most of you probably don't know much about bankruptcy, for good reason. We are who we are. And where we are, there are approximately 350 bankruptcy judges in the United States. We are in ninety-four districts: four districts in California. We are in the Central District. We have about 19 million people in our district, about half the population in California. We are appointed for fourteen-year terms by the Circuit. In this case the Ninth Circuit. That's pretty much who we are. Within the district we have five divisions. I am in Los Angeles. The number is shifting a little bit. I think we have twenty-two at the moment due to a few retirements. Of those, I think nine or ten are in Los Angeles. It's hard to keep track. We have a division in Woodland Hills. We have a division one judge up in Santa Barbara, which is a really nice place to be if you like Santa Barbara. And then we have judges in Riverside and also in Santa Ana. So that's physically where we are.

And Judge Kaufman you're in Woodland Hills, and, like I say, I'm in downtown. Actually, I live closer to the court in Woodland Hills than I do downtown, but that's where the action is. Fortunately, MetroLink gets me there, so, I'm in good shape, rather than having to drive the 101 every morning.

I started the program with the consent of, at that time, my twenty colleagues. I didn't know much about bankruptcy, but I got the bug in my bonnet to try and set up the program so myself with my law clerk, we started in 1994. Talking about it, we had a retreat where we got the other judges on board. I brought in people from Washington, and a few of the bankruptcy courts in particular up in the Northern District of California who had already set up programs.

In order to get the judges, my goal was, I knew that judges were pretty independent folks, but I didn't want any antagonistic people in the program, so I wanted them to understand why they would want to do it. At the end of the day, everybody was in favor of it to one degree or another. So I accomplished my goal and it went live in 1995. I want to tell you a little bit about the structure of it. This is a governmental program. The only cases we deal with of course, I shouldn't say of course, but it is obvious to me, are the

ones that are filed as lawsuits in the bankruptcy courts. Those are the only cases that this program deals with. And it comes before the various bankruptcy judges. We have a pretty good success rate – about 64% of the cases that are sent to our program settle. We have approximately 200 volunteer mediators, mostly lawyers. But when I set up the program, I really wanted it to be as broad as possible. And so, we have a district court program that is slightly different. But in our program, you don't have to be a lawyer. But if you are, you have to be a lawyer for five years. Why? Because we had to pick some number. It seems like a little arbitrary but at some point you have to pick something and that's what we did.

Unlike the district court program, you don't have to be a lawyer, and there, I think its ten years in the district court program. It's not right or wrong, its just we had to set up; I do a number of lecturing around the country, and one actually in Belgrade, Serbia, as to setting up programs. I know all the questions, I just don't know the answers. The answers are cultural, but I know the questions you need to ask to set up a program, and the answer may be different depending on where you are. Such as, "who are the panelists?" Ours are mostly lawyers, mostly bankruptcy lawyers. And when you want to be on the panel, you file an application, and then we send it around to my colleagues, and see if they agree or not.

There were a number of issues when we started the program. Actually, we went live in 1995, but we started setting it up in 1994 and we had a number of issues to decide. For instance, did they need training? It seems obvious now. For instance, our colleague here in San Diego who set up the program there, Elisa Adler, they didn't have training. That was 1986, I think. It was the first program in the United States with the bankruptcy court. They didn't have people to get training, so they didn't have training. They had one division there. Ours, by the time we set it up, there were a number of outfits to look at, and I searched around. Because one of the issues is, do you require people to be trained? The answer seems obvious to me, yes. People are not born, well some people are born mediators, and by the way our program is a mediation program. There is no arbitration or anything of that sort. It is a mediation program. And so, we decided, yes. We looked around and the only two programs I could find at the time were the LA County Bar had one and Straus Institute. I had better responses from Straus. Nothing wrong with the LA County Bar, but I was much more impressed with Straus and Peter Robinson. Gosh, I cannot remember who was with him. He was also terrific. Drawing a blank on his name. Fabulous. Anyways, we work with them, and I still to this day work with Peter and so we decided we'd have a minimum of thirty hours training. Nothing magical about it, but at the time that was the number of hours at least in their basic program, and so except for the people so-called grand fathered in who had experience (and that was only a handful of people), most had to go through the course. Since we made them go through the course, I went through the course. I figured if I made them do it, I should do it too. And so as far as getting paid, ours is different than the district court. About 25% of our cases deal with *pro se*'s – people who can't afford attorneys. So, I decided, and again my colleagues agreed ultimately,

that they would not get paid for it. That's a big thing obviously. But, so, we people that are 200 or so mediators, they volunteer to do one mediation a quarter for one day. We don't even define a day. But it could go more than eight hours or less. And they don't get paid for that. And everybody knows that going in. If it goes beyond the day, then again I don't want to get involved with that. First of all, it's only me and one person, the clerk's office and my law clerk that deal with it. We don't have the staff to go through and see if you really, can you pay, can you not pay. It just wasn't worth it for us. When it goes beyond the day, then it's up to the parties, including the mediator, and the few cases we had, most of the mediators agree to do it without pay. If they have done their one, they have to agree to do one per quarter. Once they have done their one per quarter, then they don't have to do it, unless the mediator agrees and if they want to get paid or not. Again, it's strictly up to the parties. Sometimes they agree, sometimes they don't. I don't want to get involved with it, and I don't.

What can be mediated? Anything can be mediated. There's no limitation on the sort of things we can do. How do you get the assignment? Each judge has the opportunity to have all of the materials. We have a list of all the mediators. We have a bio of the mediators and the actual form. Everything by the way, I am saying, is on our website, which is [www.cacb.uscourts.gov](http://www.cacb.uscourts.gov) so if you want to learn everything about bankruptcy court, that's where you look. Our whole – I have a copy of it here – but our whole amended general order is all there; you know, what you do; what you have to do. And so, the assignment is designed to typically be in court.

Each judge does it differently, but to me I typically – it's in our status conference report whether you want to or not. And what we do is, I like it right in court. I say, if you want to do it, fine go outside and fill it out. Then I know they're going to do it. But every judge is different, how that assigns. It's meant to be pretty broad. That is, I have a few times ordered people to mediation. One of our judges—I won't mention his name—will actually order you to choose a mediator. I prefer not to do that. But, in order to get the consensus of my colleagues, you need it to be as broad as possible. So, I'm not saying which is right or wrong. There are some mandatory parts of this. There is a confidentiality agreement. We won't go into that, but you know generally what that is. It has to be signed. There are a couple of things that have to be done. That's one of them. The person with the authority to settle has to attend. We have some exceptions for governmental agencies where it is maybe more difficult to get that. There is a mediation statement that has to be filed. Again, mandatory: no more than ten pages. It's due seven days before the conference. And so there are a few things like that as you might guess.

If you want to get more of the structure, but it's pretty well structured that you know you have to show up typically within thirty days after the assignment and that's it except a few other things. The statement that is, this ten page statement or less, lists what you have to put in there as far as other parties that are interested in various things. And that's it. We have two computer programs. One is linked to the case management program and that

is really tricky stuff. I didn't think it was that hard, but it really is. We have another one, which is a satisfaction program. We send out anonymously and we get pretty good response since it's anonymous since we don't know if they will return it or not. And that took a lot of time. We had the Straus institute help prepare that. I thought it would be a lot easier than it was. And finally, we have an annual joint program with the district court to pat people on the back. Everybody likes that, and it's in downtown LA. We have it towards the end of the year. And that's pretty much at least the structure of our program.

**Derek Muller:** Thank you.

**Judge Kaufman:** So, I'm one of the beneficiaries of this program: both as a bankruptcy lawyer (I was a bankruptcy lawyer for sixteen years, mostly in bankruptcy litigation before I became a judge) and then I have been a bankruptcy judge for ten years. So both as a lawyer representing clients and as a judge involved in people using mediation during litigation, I have seen the benefits of mediation and of course Judge Russell was critical in setting up our program, which has been phenomenally successful.

The one thing in general is: in litigation versus mediation, and you know the downside about litigation of course, among others things (if there was a lot of positive things about litigation I wouldn't a judge) is that it's time consuming. You know there's the delay: the costs. Obviously you've got lawyers on both sides sometimes, unless someone is representing themselves, but if they're representing themselves, it's even more costs sometimes for the other side: the lawyers. There's uncertainty of your outcome. You don't have control over your outcome. Somebody else is going to determine the facts. Ultimately, somebody else is going to apply the law. You may not agree with the way they've done it. You're going to get a result. The outcomes are also limited, right? Because there are only certain remedies that are available. Maybe injunctive relief or maybe money, right? But there may be other creative solutions meeting people's interests that, as a judge, I can't order. Like I may love to tell people, you know, make up or whatever, but whatever other kind of creative solutions that I could think of on my own, but I'm not allowed to enforce that. I'm very limited as to what we can order. So that's one thing about litigation, is that some creative solutions are kind of left behind because the judge can't require them or mandate them.

Outside of the context of arbitration, which has limited prospects of appeal, there is the prospect of appeal. So you could be the winner at the trial court level, and then you could be stuck for years in appeals. So there's also that problem with litigation. And then, another thing is that even if you win and get a big judgment, you have got to collect that money. Maybe your opponent has spent all their money on lawyers and has no money anymore. So, you know, another thing is, when you're litigating, there's all these issues that you need to take into account.

With mediation you have greater control over the outcome because no one can force you to take anything less than what you want. I mean, that's the concept of settlement. People have to agree. There are more creative

solutions that can be devised. You're not limited with what the law provides. There's no appeal time. Quicker resolution.

When I was a lawyer, and also as a judge, I always try to tell people, "wouldn't you rather spend your energy on happier things than litigating and spending your money and all of that emotional wear and tear?" You could take that time you would be spending in front of me as a judge or with me as a lawyer and be with your family. You know? Make more money. Whatever it is that makes you happy. Rather than spending your time in court or in depositions or litigating.

The other thing is, I was going to talk about another example of addressing parties' interests. I had a bankruptcy case as a judge. It was about a hotel. And there was the owner of the hotel, and there was a person who had a security interest in the hotel and they were deciding how to reorganize the corporation that held the hotel. And they were fighting about who would get the hotel. We were literally having, you know, a trial about who was going to get the hotel. There were a lot of issues involved as far as the interest rate and at a certain point, you know, I, this is unusual, I just said: "Can we just talk? You know you both can't have the hotel right? Somebody is not getting the hotel. Someone is going to lose. I can't divide the hotel. Can we think about ways like: what are you going to do? Can we do something where you can agree that one person gets the hotel and how will the other person still be happy if one person gets the hotel? Because you both can't have the hotel; like you're both not going to end up with the hotel."

So, we actually ended up having a conversation—it was more just kind of getting it started—like let's think about, for the creditor it wasn't that they wanted the hotel, they just wanted to make sure that they would get paid. They had concerns about the person running the hotel's competency, and the interest rate. And so really, we were able to think about what are their interests as opposed to, you know, I mean like, somebody winning by getting a hotel. The creditor doesn't even want the hotel, right? So, these are the kind of things that can happen in mediation. You know, as a judge, somebody would have gotten that hotel and somebody would have lost the hotel. They were happier with the solution than with one person or not getting the hotel with the legal parameters.

The other thing I want to talk a little bit about is timing for mediation versus litigation. Because, if you think, when is a good time to mediate? When should you start? Should it be early on litigation, should it be later in litigation? One of the benefits of mediating early is of course that you save that much more money. If you reach a resolution you've saved that much more money and time you would've spent on litigation. And, also, you can start opening communication about alternative solutions like creative solutions. You can start thinking about them with the other side. You involve somebody neutral and this can be really good as a lawyer because sometimes the lawyers can't tell their clients the weaknesses of their cases. Clients may think that you don't believe in them, they may think that you aren't going to tough it out for them. They may think that you have doubt in them. You know, that you can't take it. And so, sometimes, you know, the lawyers,

sometimes its good to have somebody else telling your client what their problems are. Because you may feel like if I tell them, they're going to be mad at me. They aren't going to like me. They are going to think that I'm not going to try hard for them. And I'm tough and I'm going to take it to the mat. So sometimes it's really good to involve a neutral person to discuss creative solutions so you don't look like you are a wuss who doesn't want to fight for them. So that's good. It doesn't hurt to have that early, right? Even if they are not totally ready.

The downside would be that you may not have discovery yet, so there may be information that you don't yet have from the other side. You may have not taken depositions yet. You won't know as much about the strengths or weaknesses of your case. I know that for me, as a judge, I give people a deadline for mediation. When they indicate they want to do mediation or I compel mediation, I usually have my deadline after discovery so that they have had that chance to take discovery before they go to mediation. Sometimes people go before then.

The other thing about doing mediation early is that they may not be ready mentally to settle. Sometimes they go in and want to prove their point. They want to win. They haven't been beaten down yet by the outcomes of various skirmishes. So, sometimes it's better to do the mediation later because they get litigation weary and get more realistic about what it's like – the time, the delay, and what a pain this is, I have to spend my day in court now, and I have to be deposed and whatever it is. I'm paying these bills and it's so expensive. So, it can be good. That's why sometimes it's better to wait longer. Sometimes mediations are more effective later. One important thing about mediation is that you don't have to mediate just one time. You can try and try again. I've had cases where we mediated early and it didn't work out, but it still laid the groundwork for an eventual solution. We go mediate again when we have more information or the clients are more tired or the lawyers are more tired or whoever is more tired. Sometimes the second mediation seals the deal. So, there's nothing wrong with trying more or doing it once because it isn't the only time you can do it. In between the two times, it could be, like I said, it could be the people's mental state, it could be the mediator. There could be a lot of reasons why it doesn't settle the first mediation, but it could still settle at the second. Even if the first mediation isn't successful, it can lay the groundwork for subsequent solution. I've had all sorts of situations where the mediator says to the lawyer, "we couldn't settle the first time, but we came up with proposals and subsequently the lawyers were able to work it out, based on that framework, with the clients." So, I think that when we talk about our success rate in mediation, it probably understates the success rate. Just because it doesn't settle at the end of that mediation session, doesn't mean that the parties won't take those solutions and proposals and work them out later on their own. That one, you wouldn't get a mediation certificate that says you completed mediation successfully from the mediator, but that mediator was critical to the parties eventually reaching a solution.

One thing that I wanted to talk about is that when you are looking for a mediator, who should you look for? And, of course, it's good to have people



who have that experience. A lot of times people think that the best mediators are going to knock heads together. But, the best mediators aren't necessarily head-knocker people. Sometimes the calmest people you know are the best mediators. I think one thing is that they are just dogged. They are going to make it work, you know? They really do try. They don't give in easily. If it reaches impasse, impasse, impasse, but they kind of try and stick it out. They try and push the parties. Sometimes by nine 'o' clock at night if they have stuck you in a room, people start thinking, "Gosh I just want to get out of this room. What can we do to settle?" Sometimes it's good to have a mediator that is really willing to push the parties as far as to keep trying.

My last topic that I want to talk about is whether it is appropriate to compel mediation, which seems like a weird concept. Mediation of course, people have to agree, right? Can you force people to mediate knowing that, unless they agree, it won't work? Right? I have to say both as a lawyer when judges would order my clients to mediation, and as a judge where I have ordered people to mediation, it has sometimes been very effective. You would think no, but why is it that even when people say they don't want to mediate and—"I will never settle, wild horses won't drag me,"—they get into mediation and sometimes they settle. One reason is they say that because they want to seem tough, right? They are posturing, right? To say "I want to settle" is a sign of weakness, maybe. Some people just don't want to admit that they want to settle. So, you are helping them out by telling them. Now it's, "I didn't want to go to mediation, but the mean judge made me go to mediation." And, ultimately then, they work it out, right? That's one reason. And then, sometimes when they get into the mediation, and if there's a qualified mediator, they realize that a negotiated outcome could be the best solution for them. That could be the best solution, which they don't realize until they are there. Sometimes a good mediator really takes the emotion out of the room, right? So, all of this emotion that can sometimes be built up with the parties, the mediator can kind of cut through that. Especially, when you are starting to think of solutions as opposed to when you are looking at litigated outcomes. So the people that thought they would never settle and didn't even want to go to mediation, will settle. So, I don't do that all the time. Sometimes I have a gut feel about how likely it is. I don't really want to burden mediators who are doing it for free with people who are never ever going to settle. Sometimes you just have this sense that they have been litigating for ten years, it's going to go on forever, and a stake needs to go in its heart. But, it can be that people who say they don't want to mediate will reach a consensual resolution, so it's something to keep in mind. So those are my comments about my experience in mediation.

**Derek Muller:** Thank you.

**Selena Shultz:** Well, first of all, it's an honor to be here. I got my LLM at Straus. This is a special place. I always love coming back and when Mark Travis called me in the fall to ask if I would like to participate, I asked him when it was, and he said February. And I live in Pittsburg and I said I'd be here. He said, "Selena, I don't think they're paying for you to come." And I said, "I don't care. It's snowing there, so it's all good."

First up, before I give my comments, I want to say about both the Judges' comments. First of all, how Judge Russell . . . bravo for 1995 putting together the program and being a pioneer to do that. Lots of people, I'm sure, have benefitted over the years of that. That's huge. With Judge Kaufman, some very insightful comments. I love the comments on the timing of mediation. As a twenty-year mediator, I really think that every time is a good time to mediate. I love and really find her comments insightful about planting the seeds. So, when you go out, for those of you who are going to go out and eventually be mediators, that's a really important thing to remember. Every time you mediate, you might not help settle the case right then, but you are planting seeds and a lot of times you settle the case without really knowing it later on. Maybe with the structure. Maybe with a thought in the client's head. Maybe it just wasn't ready that day to settle. So, that's a really important thing to carry from Judge Kaufman's comments.

The perspective I'm going to bring today to the panel is really talking to you about as a mediator working on a panel: whether it's through a court program or also, as Mark does, mediating for the EEOC, so you are mediating there for an agency. I also mediate in an in-house program for Home Depot. So that's a little bit different when you are mediating inside a program compared to privately. So to give you a percentage, probably 30% of my work is in a program and the other 70% of my mediation work is private. So I do both. The other thing is, I love the name of the Symposium today about Flexibility. For those of you who are going to go try to make mediation your career, there really is a lot of flexibility that you have to bring to that and figuring out how you are going to fill your time. If you're going to be a full-time neutral, you have to do a lot of different things often. You're probably going to be doing some private work, some work inside a program. And then maybe . . . I do a lot of conflict consulting work with companies. So you're going to piece together a lot of different things, so you have to be flexible on how you approach things. I liked what Cedric said on the panel before, the words he used, the "plus and minuses." So I want to talk to you about being a mediator in the programs as compared to privately. What are some of the challenges you're going to have and advantages that you are going to have of mediating within a program compared to mediating privately. So let me talk first about creativity. So one of the best things about mediating is as long as you hit those three pillars of it, being "voluntary, confidential, and self determination." As a private mediator you really have the freedom of process: of figuring out your forms, timing, where you are going to do the mediation, payment, all of those kinds of things. When you mediate inside of a program, a lot of times some of that is lost. So you have a structured program, maybe you already have forms, maybe the timing is already set out for you, maybe your fees are already decided. Sounds like from this Court's program that it's voluntary.

The bankruptcy court that I work with, the Western District of Pennsylvania, we actually do get to charge our hourly rate and then we do have to volunteer for a couple. We are a much smaller panel so it's going to be different every place you go, but that creativity, you might have some

parameters on how you have to address a case. That can be a bit of a conundrum. For the EEOC cases that Mark and I do, you are paid a flat fee per case. So that makes it hard when you are trying to run a business of doing some of the pre-mediation work you might like to do and some of the post-mediation work that you like to do. How I get around that is I just do it because it's the thing to do. I will tell you guys that are going to be young mediators, that is the best PR that you can give for your mediation practice. Is to do cases the way you should do cases, and they will settle. Then those attorneys who were sitting in that EEOC mediation are going to hire you for that paying case. So let me give you that as a big piece of advice. And when you have programs like this that in your area that you can volunteer for, do it. Because people will see you, your skills will get honed, and that's really important. So that is a huge thing to take away. So that creativity is sometimes a little bit hard because you have these parameters of programs.

The other piece that sometimes can be a little tricky when you are doing programs, not for the EEOC because you are not mediating with a fact finder involved, but when you are mediating in a court program, the confidentiality you have to be really careful about. In the court program that I am mediate for in the Western District the judges actually do appoint you. So they pick you. They have a panel of mediators that they use for bankruptcy cases and the judge will send out an order with three for the parties and counsel to choose from. So you are working with the same judges over and over again in cases. You're getting calls from their clerks. They're wanting to know the status, so that is really important that you keep that confidentiality that the parties and the attorneys expect from you. That is something that is really important when you are on a panel.

Sometimes, though, you get to a point in mediation where you think it would be important for the judge to understand why you are delaying mediation. I'll give you an example: I had a case, actually a divorce case, where the husband was the debtor and the wife was the creditor. The husband had a business and they wanted to delay the mediation for a couple months, have another session so they could have a forensic accountant come in and look at the business because the husband thought, "if the wife could see what my expenses are, she would be willing to settle for what I am offering." The wife didn't feel like she could make an informed decision until she had somebody look at the business. So basically we needed that delay of a couple months before we had another session. So I asked both parties, "Are you okay with me telling the judge that that is where we are and that is what we are doing." They were fine with it. So you have to be a little creative sometimes because you have the court looking over you and you are having to make these decisions without tipping either parties hand or what is delaying or keeping things going because that judge is going to be the ultimate trier of fact. So that's important with those cases to keep that in mind.

The time constraints. Time constraints in a program I would actually say are kind of an advantage. It's a little bit like how Judge Kaufman was saying how it's nice when somebody else orders mediation. It's nice when somebody tells the parties besides you that this has to be settled by this date or you're

going to court. So the time constraints in programs can be really helpful in getting things settled. And I will tell you that you don't start mediating for very long without finding out that cases settle in the last hour. No matter if you have three days of mediation, a day of mediation, or two hours of mediation. So those time constraints can be really helpful to you in getting cases settled. I would say that that's actually an advantage over private mediations, so that is something to think of. The other thing that is nice is that judges will sometimes help you along with in a private case sometimes, if it is of some economic advantage to delay, you will find parties delay scheduling mediations, getting things to you. What is really nice when you're doing it within a court program, what will happen is . . . so I have a case right now where they wanted some more discovery. Well the judge says: "That's fine, I will give you thirty days for discovery and then thirty days after the discovery is done, then your pre-trials are due." So there is a thirty-day window to get that mediation session in and see if we can get it settled. So that can be an advantage of a court program panel compared to mediating privately.

The other thing that is an advantage of mediating in a program is really just the credulity and the feel of the program. Especially when you have programs that they handpick who the mediators are going to be on the panel. Whether you're doing . . . I think Mark might be a little more evaluative than I am. I might be more of the reality testing kind of facilitative mediator. You have some credibility when you have been picked by a program that you . . . otherwise, when you do it privately, you might not have. That will help you with your credibility for the parties. So that is helpful in doing it in a panel.

There are a couple of special advantages I would say with both the bankruptcy mediations I do and also with the EEOC. With the bankruptcy mediations I do, sometimes a party to the mediation is actually the bankruptcy trustee. This, I've found, has been really helpful when the trustee is part of the mediation, because unlike the parties, they do not have such a personal stake in it. So a lot of times what happens in bankruptcy mediations when you have a trustee there is . . . they actually almost end up, in some ways, like a co-mediator where they are helping you come up with some creative solutions based on their position as the trustee. They also have some different ideas and ways to get the case to settle, so I have found that in those bankruptcy cases the trustee being part of the mediation can be really helpful.

In the EEOC cases: the thing I think is great in those cases—a lot of times these are really before the case there has been an EEOC investigation—it is very early on in the case, there has usually been no discovery, and a lot of times you have employees who are not represented. So a lot of times you have this very lop-sided mediation as far as looking at the power in the room: where you have an employee in one room without counsel and then you have a CEO of the company and an attorney in the other room. So you've got this huge imbalance of power. The really nice thing, though, is probably that employee maybe never would have gotten to the mediation on their own. Because the EEOC offers mediation and sends out a packet that explains it and that it is a choice. It really probably gets people to mediation who wouldn't otherwise

get there. I'm not sure of the exact percentages of the EEOC settlement rate but it's very high. So you are really getting people who otherwise wouldn't be exposed to mediation, would probably end up hiring an attorney, paying them 30% of whatever they would get out of the suit. So, it really is a big advantage, with those EEOC cases getting people into mediation who otherwise wouldn't be. So on that I'll turn it over to Mark.

**Mark Travis:** Thank you, I appreciate it. Just following up on a couple of things. Segue this direction from the comments that have been made already. Again I would emphasize the fact or congratulate you all on being here and being in this program. Cause, like Selina said, it is a great place to be, and we both finished our LLM here, and it is a great place to be. I would not have made the jump from private practice to being a full-time neutral had I not had this thing to put on my wall, but it was a lot more than just something to put on my wall; it added tremendous credibility to my marketing, if you will, to my practice development as a neutral. And not just my practice development but certainly with my skill development as well, because you can't just live off of that thing on the wall. So congratulations on being here, and thank you for asking me to come. What's interesting to me is I listen to all these comments. I could probably . . . I've got these notes and I am going to go over these notes of what I was going to cover but there has been so many good comments made that I can play off of most of those that have been said already.

With Judge Russell going back to starting a court program in 1995. It's amazing how much happened historically in the 1990s in the world of ADR, especially at the statutory and the regulatory level with the Administrative Dispute Resolution Act, the ADR Act, the federal level and how that promoted and institutionalized ADR. So a lot of things were put into place at that time and Judge Kaufman's comments: you can take many of those comments about mediation and I am going to draw on many of those because they are commonplace whether or not its bankruptcy, whether or not it's employment, whatever it is, intellectual property, whatever. Those skills, those strategies, those tactics play well in any form of mediation. And I want to talk about arbitration a little bit too because part of what we are talking about here is not just mediation, but more globally, institutional ADR in terms of arbitration, mediation, other things as well.

But my focus is purely on the employment realm because that is all I do. And focusing on what Selina was talking about, working in different worlds for good or bad that is what I do too. It is all employment, but it may be federal sector where I am mediating for an agency within an agency. It may be EEOC where I am mediating with private sector employers under the umbrella of the EEOC. It could be private sector mediation, what I call "Retail Mediation." That is capital "M" mediation, the private practice mediation. Some of the other things that I've talked about in terms of systems in organizations and things of that nature, I call that "Wholesale mediation." That's big picture mediation not just single one-on-one types of cases. So what I want to do is focus that discussion on employment dispute resolution a little bit more in terms of both capital "M" retail Mediation as well as small

“m” wholesale mediation, if you will. Of course you all know Professor Stipanowich and the work that he has done in evaluating studying the use of ADR in organizations, in companies in the fortune 1000. I go back and I keep that article with me because I’m asked about it from time-to-time actually by CEOs and general counsel and how other companies handle mediation. Either capital “M” or small “m” retail versus wholesale mediation. Now I want to just give you a couple points about that.

In that study that Professor Stipanowich did about employment, it covered all forms of dispute resolution in the fortune 1000. But in terms of employment, just as an aside, 98% of the fortune 1000 used alternative dispute resolution in employment matters—98 percent. Now of mediation, 86% of the fortune 1000 that responded to that say they used mediation or in the past three years have used mediation. That is up considerably. What is interesting when we talk about synergy or flexibility, or things of that nature, what is interesting is that arbitration has gone down, and we could have a whole discussion about why arbitration has gone down in employment as well as other subject-matter areas. What I can tell you about employment dispute resolution, specifically mediation, is that 86% of employers have used that in the last three years. That is, not surprisingly, the highest level of any subject-matter area where mediation is used: employment. Intellectual property, products liability, commercial, all those are increasing but employment is the highest; it is firmly established in the fabric of alternative dispute resolution or mediation. Eighty-seven percent of those responding said they would be likely or very likely to use mediation in employment disputes going forward. The vast majority said they would be unlikely or very unlikely to use arbitration in employment disputes going forward. Again, we could have a whole other discussion about this, and it would not surprise you what these reasons are, but that is not what we are going to go through today.

For those of you that want to be a neutral, you need to know what’s important as a neutral, what is important to those that select you to be a neutral. This goes back to that study as well, and I will get to some more practical suggestions here in a minute, but I think this is important. Eighty percent of the referrals come from either ADR providers or word-of-mouth. ADR providers in my world is usually AAA. In the South, we do not have the Judicit West and JAMS does not have a big presence in my world in the Southeast. There are JAMS offices in the Southeast but in Tennessee there are not. So most of that comes from AAA. So, 80% of the referrals come from an ADR provider or from word-of-mouth. What does word-of-mouth tell you? That means if you do a good job, you are going to get repeat calls. And that goes to being persistent and not giving up and I want to address that in just a minute or two. The perception also, with respect to neutrals, 90% of the neutrals in employment dispute resolution, these Fortune 1000s believe are somewhat qualified or very qualified. What does that tell me as a neutral in employment dispute resolution? Be prepared, know the facts, know the law and that is going to be the word-of-mouth that gets you repeat business in that world of employment alternative dispute resolution. Those statistics are

telling; those statistics give us guidance on what is important in employment dispute resolution, and you can take some real practical lessons from that.

Let me talk for just a couple of minutes about why I believe employment dispute resolution, and this really is not just dispute resolution but why I think employment-litigation and the dispute resolution component of that is unique or different. For those of you that have any interest in employment law or employment dispute resolution, the law itself is very dynamic; it is not static; it is always changing; it is always fluid. There is either a new law or a new interpretation of a law coming out all of the time. It is not contracts. Not to down play other areas of law at all, but it is not just, “was there a breach of a contract or wasn’t, was there negligence or wasn’t there.” This law is changing all the time as to what is protected, what is not, what the elements of the case are. The facts within each case are dynamic. There are shifting burdens of proof. It is not just breach or no breach, negligence or not negligence. It is shifting burdens. It is a *prima facie* case. It is a rebuttal of that. It is a pretext argument going back the other way. It is complicated. It is not something that you toy with: that you tinker with as an attorney. So that is what is one of the things that is different that always plays into employment litigation and the mediation and arbitration of those cases and the resolution of those cases.

The other thing that is important about employment law is the legal fees: those are built in or I should say not built in, however you want to play it. This is a big component in any mediation of an employment case. The attorney is in like that with the party. Those attorneys’ fees are added on. It is the rule rather than the exception anymore that if a case goes to trial, the attorneys’ fees are going to exceed the plaintiff’s recovery. That is the rule rather than the exception. I know some plaintiff’s lawyers that find that distasteful and do not like that, but obviously they do their work, and they are entitled to be paid for it. And the law encourages that. So that is a big hurdle in any employment litigation and employment law. I could sit here and say they are highly emotional too; well, isn’t any lawsuit highly emotional? But other than domestic, where we live and sleep and eat and breathe, at home, where else do we spend the rest of our lives? At work. So, when that relationship is severed, that is highly emotional. It is not transactional. So, we got that overlay as well. So, those are some of the challenges in employment mediation dispute resolution.

There was a discussion earlier in one of the previous sessions about settlement outside arbitration; there were several discussion questions about settlement in the context of or mediating in the context of arbitration. In employment, I can tell you that it is not at all unusual. There are many cases that I have in my file cabinet over the next six months, probably twelve arbitration sets. And this is consistent with lawsuits in general; I would be lucky if I hear probably three of those because they will settle. Unlike, talking about comparing mediation and arbitration, some of the discussions in the first session, I will not bring it up. I sort of assume that these are experienced lawyers; they are going to mediate, and they know how the mediation process works. They are going to bring it up and do it on their own if they want to do

it. They are big boys and girls, and they will figure that out. About the most that I will do is about thirty days prior to the hearing when, just by happenstance that's usually when the cancellation period for my arbitration is, I will do them the favor of reminding them that it is about thirty days out, and are there any active settlement discussions going on, and if so, is there a reasonable possibility of settlement, a good possibility of settlement, or very unlikely? I am doing them a favor; I am letting them know that we are getting close. They know when my cancellation is, I do not have to remind them of that. They should know that. But I will suggest that to them or inquire them of that to get them focused if they have not previously thought of that they need to start thinking about it. They need to start thinking about it. I have not done any med/arb myself. I know there is a lot of discussion about that in the arbitration community. I have got my first one coming up in a couple of months actually, but I wanted to mention that about how settlement plays into the role of utilizing mediation in an arbitration setting.

Just a few other things that I wanted to follow up on a comment about persistence and not giving up and following up with the process. I am pulling this up actually because I had a case earlier in the week on Wednesday. I gave them until five o'clock, my time. I am not going to play the voicemail, but I have the script of the voicemail. I am not disclosing any confidences. But this was on Wednesday: "Mark it's so-and-so, I can't remember what time you were speaking. I have approval to agree to the mediator's proposal. I'll need some other conditions on that as well regarding confidentiality, etc." I am not going to get into mediators' proposal and things of that nature, but it just goes to show you if I could give one bit of advice to young mediators in the process of going out to starting and mediate, it would be about persistence, about never giving up. When I look back at the first few cases that I did as a mediator, I look back on the cases that did not resolve because I gave up, because I said we were done. It is not the mediator's goal to say you are done. Your goal is to say, "I'll stay here until everybody leaves and you all get tired of me talking." It is kind of funny, but that is what I tell people. I do not tell people they are at impasse. I do not use that word in mediation. I just say that I will stay here and keep talking until you all leave and get tired of me, or if I am at their office, until they tell me to get out. If you live by that, you will have a lot of success.

I have been talking about litigating cases, about capital "M" mediation. I want to emphasize to everybody in this room, and I take this opportunity because as most of you are younger than me, that is for sure, you are going to be going out and there is something to be said about, before you get big capital "M" cases you have to have a little or a lot of gray hair and most of you are not encountering that. But there's a lot of work out there in the small case "m," the wholesale mediation within organizations, within businesses, within nonprofits. Professor Stipanowich's study said 35% of the Fortune 1000 have internal dispute resolution programs where they do consulting, conciliation, coaching, ombuds. All those sorts of things are out there for young mediators who are exploring this field and getting their feet wet in this field. One of the things I would stress to you if you are in this field



and you are dedicated to it and really want to make it a career, other than those fortune 1000, which are kind of hard to get into, another rich area in this field is in the Federal sector. There are all kinds of employment opportunities for ADR professionals in the Federal sector. Until I started doing Federal sector work, I never knew the multitude, the myriad of opportunities for doing counseling, EEO counseling, EEO mediation, EEO fact-finding. The agencies are required to have them in the Federal sector: it is required. So, just as a practice pointer, looking forward, if you want to look into that area, it is good work. It usually pays pretty well with a lot of benefits and you get to do what you want to do. If you have a passion for that, I would definitely recommend that to you.

I will mention a couple of final things. The EEOC mediation, following up on what Selina said, the success rate, and really the EEOC has the largest repository of information regarding employment ADR. There are 90,000 cases that come in every year—90,000. They only mediate a small portion of those, usually around 11-12,000 cases per year. They are early in the case, but they end up settling about 75% of them without anything being done. Nobody has really done anything other than look at the charge, look at the facts of the case, and sit down and talk about it. Seventy-five percent of the time, they get resolved. I would hope that if they actually mediated it more they would get rid of some of the backlog that they have, which is significant. They basically have a year's worth of work; they have got 75,000 cases in a backlog right now of charges that have not been resolved. I wanted to mention that type of work that is out there in the dispute resolution field other than the big dollar, highly-lawyered, litigated cases, there is a world of work out there in the ADR community.

**Derek Muller:** Thank you. You have had a chance to riff off what the other panelists have said. I want to give the other panelists a chance to sort of offer their own thoughts or respond to some of the things that were said on the panel.

**Judge Russell:** I have a couple comments. This has been terrific. By the way, I do not know anything about labor law, but a couple things. One is, one thing that was mentioned that did concern me, not on Selina's part, but there is a real problem in the federal judiciary, probably the judiciary in general, about contacts with neutrals. As a neutral, if a judge calls, you are going to obviously answer. But I was astounded a few years ago; we had a program—judges like to be in control, that's sort of the nature of being judges—and I was astounded when we were at this program and judges thought nothing of checking with the mediator to see how things were going and I said, "oh my god you've got to be kidding." So, if you have a choice and if there is say, as an example, something is coming up and you need a little bit of discovery, whatever, could be a trial coming up, could be a motion for summary judgment, whatever, something coming up, and the parties say, "gee we'd like to get the judge to, you know, maybe continue it," the way to do it is, at least in your situation, is ask the parties to ask the judge. Of course, if the judge calls, you're stuck. It is a terrible thing for a judge because you never know, the judge will say "well how are things going" and things get to

be a slippery slope there with talking about the case. So, my suggestion is if you ever do it, ask the parties. Because in my case we have status reports every so often when we have these hearings, but even if not, you know, you set a deadline for what you want or whatever. Parties can make the motion: say, “we’re at the mediation without disclosing anything we would like to extend it.” And of course, from the judge’s standpoint . . . part of our biggest stick is pressure, reasonable pressure. I tell people when they send out the mediation, that is not just a stalling tactic. For some people, they say, “oh good we can do this, and we won’t have to comply.” I let them know, but I’m reasonable. If it seems reasonable, I’ll do it. But on the other hand, part of being a judge is keeping that pressure on like the last hour of mediation to get them to do it.

The other comment I had is as far as “when.” There is no good answer as to “when,” that is, when to do the mediation. But let me give you a brief story. But there is something to be said in the lingo of mediations called the mediation dance. There are some times you just got to do the dance because if you do it too early you will think “oh gosh I gave in too much I could have gotten more.” You sort of have to do what’s referred to at least in my parlance as a dance. And that is in personal relationships or anything. Sometimes you give in too soon or you are too soft, whatever, but as far as “when,” I think they should be earlier than later.

I will give you an example—I got a call a few years ago, I do not know if I have mentioned it in these programs so you might have heard it before, but from one of my colleagues in Las Vegas, a bankruptcy judge, and she said, “You know, this case was just filed; it was a chapter eleven, and these guys, you know, if this thing does not settle now . . .” And even the answers had not even been filed at that point. I thought, “this is crazy! How are you going to”—you know where I’m going of course, I wouldn’t be telling you this—but I said “ok, I will do you a favor.” So, they flew out, these two guys, they were in business, they flew out to Los Angeles and came in, and I said later I was freed from any stress because I knew this was not going to settle, so I could do whatever. I was not worried about sticking it out too long because there was no way in hell this thing was going to settle. And so, we come in and these guys were both very successful, two guys, they were in business, I forget what kind exactly because this was a number of years ago. But one had sold something to the other, and they were really good at what they did. And what Judge Kaufman said, eventually I looked at them and we chitchatted awhile, you know, just about this, that, and the other thing, just to figure out, you know, all together. By the way—what you have to know is in most cases, virtually every case, you do not really need much discovery because the lawyers do not know anything, but the parties, they know what all the facts are. The lawyers may not know. But in this particular case, I basically said, you know, after figuring out what was going on, and as Judge Kaufman said, you know, we can order people to do stuff. I tell people, I can order you to do anything, but I cannot make you do anything. I could make you awfully sorry that you did not do it, but I still cannot order it. But that is why mediation is great because it is much more durable if the parties agree. You know, again,

we can order anything. But in this particular case, we were chitchatting to the guys. I was an engineer before I went to law school, and both these guys were very technical, so we chitchatted about this, that, and the other thing, and had some rapport. Then at some point I said: “Look,” I said pretty much like what Judge Kaufman said or similar, I said, “You know, you guys are the titans here,” and literally, these guys were multimillionaires, “and you guys could battle this thing out forever and I have no idea,” and I did not have any idea who was going to win or lose. And I said, “You can do one of two things: you are very good at what you do, and do it, that is, the business, or you can sit here doing this litigation.” A light must have gone on, and at the end of the day, they settled the damn thing, and I called up my judge colleague in Las Vegas and said, “You know, you will not believe what just happened here, but it really made sense.”

And the one thing, my final comment on this thing is about getting together and the danger of being honest with your client. You know if you say too many bad things they say “Gee are you not on my side?” I think the better part of valor is the truth because the danger is if you do not tell them the bad and then the bad happens, then all hell breaks loose. But what happens is, when you get together in a group, and this has nothing to do of course with the folks up here, it may be the attorneys that are the problem. It may be, sometimes in a mediation, it may be the client is unreasonable, just their expectations and that may be due in part to the attorney or that may be just their expectations. Or it may be the attorney, this may be the first time—because when we sit in there, everyone does it slightly differently—but we get in there, you set up a table, and then I ask, first, the parties to talk. Attorneys hate that. But this may be the first time that that other client has heard what the other side, what is really going on, that it is not such a slam dunk. So, that makes it the earlier, the better. But the flip side, of course, is true that there are some cases, you know, you need to get the discovery. But in my opinion, my example I just gave you, is you just often do not need it.

And the one other thing about why people do it: my wife asked me at the time when I was setting up this program, she said, “Why would people, why would they spend,” and they gave us a little discount in the price at Straus, but it still wasn’t cheap, “spend for this program, to spend thirty hours, which is much more costly (that is the billing) than the cost of the program, for the privilege of donating their time?” I said, “You just don’t understand,” and again, I did not have the experience, but I knew from talking to people in the program. First of all, at least in the court programs, a slightly different sector, people like to help the court out, you know, a public service. Whether it is currying favor with the court, or a combination of just, you know, attorneys in particular, you know, like to join things, this group or that group, you donate your time; nobody gets paid for any of that stuff; you have this committee, that committee, that is number one. Number two is most attorneys cannot afford to become a judge, take the pay cut, but they like being in charge, being the judge. Being a mediator is like being a judge. It is not exactly the same but at least in that context in that room you are in charge. There is sort of an ego thing about that, along with trying to help people. The third thing that

was mentioned is if you really do a good job, the word gets out. In fact in my case, four of our current bankruptcy judges were former members of my program, and I knew the program was really going well when—he has just retired, but Richie Nider who was right across the hall from me, another bankruptcy judge, terrific bankruptcy lawyer—and I knew the program was successful, he was in the first class that we had here at Strauss, and he sent me a copy of his card, and at the bottom he had “available for mediation.” I knew we had done it. Anyway, those are my comments.

**Derek Muller:** Well, we have just a couple minutes left for questions. So let’s open it up if anyone has any questions.

**Student:** So, who normally are the parties in the mediation? I am thinking the person who is filing the bankruptcy and the creditors?

**Judge Russell:** Well, let me tell you, as far as in the bankruptcy court, and this is true throughout any court program, there is a suit that is A versus B; it is not just the case is filed. Someone is suing at least A versus B, maybe multiple parties, so you have got parties. And the way it works is, we have, in that kind of litigation as an example, a status conference. As judges, part of our job is to keep things moving. Every judge does it slightly differently, but part of our job is to keep it moving along reasonably. And so, I say in our case, in the bankruptcy court, one of the questions on the status report is: “Have you done mediation? Do you want to do mediation?, etc.” And so to answer your question, it is the people to the mediation. The parties are the plaintiff and the defendants, whoever those folks are, and then they are in court, and it goes from there. If that was your question? “Who are the parties?”

Even in the case of a trustee, true trustees are generally neutral but not always. The only time a trustee would be involved in one of our cases is when they are an actual party, when the trustee actually sues somebody. So, they are still a party to the case. The way we do it, I mentioned before, we do require people to be there and not be playing games. Of course, sometimes people do; you cannot stop it. We, by the way, you can be sanctioned, by not me as the administrator who I have been since the beginning, but by the judge whose case it is, for violating certain things, such as not showing up. I mean, sometimes people just blow it off. There is a court order, in our program, there is a court order that you have to comply with this and if you do not show up the judge will do whatever he or she is going to do. Sign the confidentially agreement, then show up with authority.

But there are some exceptions in that we give a lot of flexibility to the mediator. For instance: authority to settle. I mentioned before, the governmental agencies. I recognized in the very beginning that when you deal with a governmental agency, you are not likely to get the governor or the president or whatever. So, we recognize, in our general order, we recognize that is the case, but what we encourage, with the help of the parties and the mediator, is to get someone in the room with the most possible authority, maybe to get somebody by phone. Again, you always say maybe, but you think of these things. Like in any meeting, you think of these things; or one of the other questions in this mediation statement is: Is there anybody else

who is important, such as an insurance company or anybody else who is not technically a party in court, that should be there? So, we flush out in this questionnaire, and the duty of the mediator is to find out who else might be affected, who else might even fund the settlement, or whatever. That is not true in normal things, or maybe not in the labor things, but in a lot of mediations is whose pocket is necessary to pay for this thing.

**Judge Kaufman:** Yes, that is important.

**Judge Russell:** So, I would answer your question that the parties are literally the litigants.

**Student:** The reason why I ask that question is because when somebody files the bankruptcy, the people suing are the creditors I'm assuming?

**Judge Kaufman:** Yes, it can come up in different contexts. One context it can come up in is like a lawsuit, between two people, it's called an adverservicing. But sometimes in bankruptcy, we have issues like a plan of reorganization, and then there's multiple parties. Or like the City of Detroit, when the city of Detroit filed, they literally had like, they had a team of mediators. It was like the peace talks. It was on very fine bankruptcy issues, so there was a whole team of people, and I think they had that for San Bernardino too. Where they were dealing with multiple issues and reorganizing that entity, so it wasn't a one-person to one-person thing because there were multiple interests. There were labor interests, there was the interest of pensions, there was the interest of, you know, there could be a lot of competing interests. Then you may have, like, multiple mediations going on dealing with different issues, and they aren't necessarily plaintiff-defendant like your normal litigation. Bankruptcy is kind of, like, I think it can be unique in that way, where you can have lots of different kinds of disputes within the bankruptcy umbrella, within one bankruptcy case, that are not necessarily plaintiff-defendant disputes; they are the employees' issues, the secured creditors' issues, the unsecured creditors' issues, you know what I mean? So, you may have multiple parties or the trustee. You could have a mediation with five different parties that are not the plaintiff-defendant, that are representing different economic interests.

**Judge Russell:** The idea, by the way, for the program in my mind, because I set it up, was just what you were just talking about. It was not for the majority of things, A versus B, or claim objections, some things like that. But I read an article in the newspaper about just what you were talking about. There was, somewhere else in the country, there was a chapter eleven, and they appointed, in fact in the case of Detroit, Steve Rose (who is a good friend of ours and then he was a district court judge in the area) actually became one of the mediators.

**Judge Kaufman:** Yeah, he was on the team.

**Judge Russell:** That gave me the impetus. I thought, well this is great, because a plan of reorganization in a chapter eleven is about getting parties together, and it could be in that case many, many. And that's where I got the idea for the program, and so yes, we have that. But the vast majority of the actual in numbers are A versus B, but there are other circumstances in bankruptcy. Anything that has to be resolved, it can be done.

**Student:** So, if there is a settlement between A and B, and if their settlement plan somehow infringes on the rights of another creditor, how is that handled?

**Judge Russell:** That is a good question—if you had not heard it, the question is, if you are A versus B, and then that settled, it may affect somebody else. And the answer is that you need to notify that other person. But what happens, in the mediation—when they have settled, remember this is all part of a lawsuit, whether it is a plan has to be approved by the court or a lawsuit, ultimately, remember this started out as some litigation, that has to be approved by the judge, be it the plan itself, an order, or here is a settlement of this complaint. Then the judge has to sign off on it. That is no different than, say you did not have mediation, the parties just, you know, without mediation, they reach a compromise, and they have to present that to the court again to be approved.

To answer your question, who else has to be notified depends. I always ask the people, whatever the case is—sometimes it is obvious; sometimes it is not—whenever an agreement comes before me (either by way of mediation or just by way of, you know, without mediation), I always ask the parties, when it comes to the judge (say it is at a status conference or a pre-trial) they will say we have settled. And I will say, “ok, is it in writing, yes, no, whatever, tell me about it,” and then the next question I always ask is: “Is anybody else affected by this and do we have to notify them?” and sometimes the answer is yes. If so, then you send out a notice, the court will send out a notice, to whomever, maybe all the creditors, and ask, “This is the deal. Does anyone object to it?” So, it is a good question because sometimes you forget. You are trying to work it out, and you forget that you are giving up property or some rights and maybe somebody else is affected. So, you always have to be thinking about that. I guess privately too, you have got to be thinking, you settled, wait a minute, are you giving away something that is not yours or whatever. You always have to be thinking about it.

**Derek Muller:** Alright. We have about two more minutes left for one last question.

**Student:** I know there is a concept of conciliation and mediation. I know the concepts of conciliation and mediation are frequently used interchangeably. In some countries, the process will be conciliation, and they will not do mediation. The civil disputants will be mandated to go to conciliation. So, I would love to hear from your point of view as the practitioner as to whether the conciliation process separate from the mediation process here, or are these just the same with the conciliator as the mediator?

**Selina Shultz:** Ok, so in our family court, because I do a lot of family law cases, there are mandatory conciliations. I think the difference is the conciliator (at least in our court, I do not know if in your culture if it is the same) the conciliator is the trier of fact. So, there is that power, right, where they are going to be the person actually hearing the case. So, there is that difference with the mediator, the most powerful powerless person in the room, right? They can’t make a decision. So, the power, I think, of the mediation is people are a lot more forthcoming, and you can get to the heart of the issues

a lot better in mediation. At least in this country, when the conciliation happens, it is usually the trier of the fact who is doing the settlement conciliation, and that has a chilling effect on actually getting to the underlying issue. So, you can tell I'm a mediation zealot, but I think mediation is much better.

**Mark Travis:** I just want to follow up.

**Derek Muller:** Sure, yes.

**Mark Travis:** I just wanted to follow up on that because we were having a discussion somewhat about this at lunch because we do not use the term conciliation quite as much as mediation in this culture. I do not know for what reason, but following up on what Selina said about conciliation in that context, the conciliator has a bit of a hammer, alright: is the fact-finder. And this is akin to, in the EEOC process, they have mediation before an investigation. Then they do an investigation. Then, if the investigator, the one with the hammer, wants to engage in conciliation at that point, they can, or the legal enforcement unit can then conciliate the charge of discrimination. They are not mediating it. They are conciliating it. So again, it is a function of having a bit more power to be utilized in a collaborative fashion.

**Derek Muller:** Alright, well please join me in thanking our panelists.